

Application No.: 09/920,335
Amendment dated: December 13, 2005
Reply to Office Action of July 13, 2005
Attorney Docket No.: 0016.0010US1

b.) Remarks

Claims 1-39 are pending in this application. New Claim 39 has been added to alternatively define Applicants' invention.

Applicants believe that this new claim, narrower than claim 1, would be allowable over the applied reference, which does not show or suggest a second network management device that performs moderation as claimed.

Claims 1, 2, 5, 6, 17, 18, 21, 22, 31, 32, 27 and 38 were rejected under 35 U.S.C. 102(e) as being anticipated by Foster *et al.* (US 2003/0202536, "Foster application" hereinafter). Claims 3, 4, 7-16, 19, 20, 23-30 and 34-36 were rejected under 35 U.S.C. 103(a) as being unpatentable over the Foster application as applied to claim 1 above. These rejections are respectfully traversed for the following reason.

35 U.S.C. 102(e) requires that the applied application be "filed...before the invention by the applicant."

The present application was filed on July 31, 2001, a date of effective reduction to practice. The applied Foster application was filed on October 26, 2001. Thus, the Foster is not prior art *per se*.

Thus Applicants request withdrawal of the rejection.

Counsel for Applicants acknowledges that the subject matter of the Foster application that was cited against the pending claims, see e.g., paragraphs 20 and 69 of the Foster application, could have an earlier effective filing date based on some of the Provisional applications to which the Foster application claims priority. And some of these Provisional applications have filing dates prior to the filing date of the instant application, while others of these Provisional applications do not.

It is our position that the burden rests with the Office to identify the provisional application that is being used to provide effective filing date for the subject matter

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applied against the pending claims—the Office must supply substantial evidence to support its rejections; see In re Gartside, 53 U.S.P.Q.2d 1769 (Fed.Cir. 2000).

Applicants acknowledge the *ex parte* nature of the present proceedings and the need for Counsel to work with the Office to arrive at a just outcome. The cost to obtain the nine applications, to which the Foster application claims priority, will be an excessive and an unfair burden on Applicants, however. Thus, Applicants believe that the burden should sit with the Office.

For these reasons, Applicants believe that the present application is in condition for allowance since the record does not establish the existence of a prior art reference. A Notice of Allowance is respectfully solicited. Should any questions arise, the Examiner is encouraged to contact the undersigned.

Respectfully submitted,

By 
J. Grant Houston
Registration No.: 35,900
Tel.: 781 863 9991
Fax: 781 863 9931

Lexington, Massachusetts 02421
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